No. 22,415

United States Court of Appeals

For the Ninth Circuit

IRVIN RAPOPORT,

Appellant,

vs.

ROSE RAPOPORT, also known as Joan Sirott,

Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLEE'S BRIEF

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STATEMENT OF THE PLEADINGS

This is an appeal[1] from a judgment entered on August 23, 1967 by the United States District Court for the District of Nevada.[2] The judgment was rendered in an Action for Declaratory Judgment filed in the United States District Court for the District of Nevada on May 26, 1966.[3]

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[1]The record on appeal herein consists of two volumes, plus exhibits. Volume 1 contains the Clerk's Record on appeal and is numbered pages 1 to 305. Volume 2 contains the Reporter's Transcript of proceedings numbered pages 2 to 36. *All citations of the record herein are to Volume 1 and follow the form Record* p. .....

[2]Record pp. 163-164.

[3]Record pp. 2-10.

Jurisdiction of the District Court was based upon diversity of citizenship and the amount in controversy.[4]

Notice of Appeal was filed on September 18, 1967.[5] This was within the period provided by statute for appeal to a Court of Appeals.[6]

STATEMENT OF THE CASE

Appellee, Joan Sirott ("Mrs. Sirott"), after fulfilling the domiciliary requirements of Nevada, instituted divorce proceedings on May 7, 1964 against her then husband, Appellant, Irvin Rapoport ("Mr. Rapoport"), in the Second Judicial District Court of Washoe County, Nevada.[7]

Mr. Rapoport was admittedly fully aware of the pendency of the Nevada divorce proceedings.[8] However, he chose to ignore them, contenting himself merely with obtaining from the Court of Common Pleas of Montgomery County, Pennsylvania, an ex parte preliminary, and later an ex parte permanent, injunction purporting to restrain Mrs. Sirott, *inter alia,* from proceeding with the Nevada action.[9]

Mr. Rapoport did not appear, specially or otherwise, in the Nevada action.[10]

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[4]Record pp. 2-10, 156.
[5]Record p. 170.
[6]28 USC § 2107.
[7]Record pp. 29-31.
[8]Record pp. 57, 58, 133.
[9]Record pp. 194-196, 244-246.
[10]Record pp. 8, 44.

He did not assert in the Nevada action any of the "defenses" which he now attempts to assert.

He did nothing with respect to the Nevada action except mail to the Clerk of Washoe County Court, Nevada, the Attorney General of Nevada, and all the Judges of Washoe County, copies of the Pennsylvania injunctions.[11]

On July 6, 1964, the Nevada court, after hearing, entered a divorce decree in favor of Mrs. Sirott and against Mr. Rapoport.[12] Mr. Rapoport filed no appeal.

Following the divorce decree Mrs. Sirott married a Nevada businessman, George Sirott, and lived with him continually in Nevada from July 1964 to the present time.[13]

After almost two years of inaction following the Nevada divorce decree, Mr. Rapoport instituted in 1966 the present Action for Declaratory Judgment seeking to have the Nevada divorce decree declared "null and void and of no force and effect."[14]

On August 23, 1967, following trial, the United States District Court, through Bruce R. Thompson, District Judge, entered judgment declaring valid the Nevada divorce decree.[15]

This appeal followed.

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[11]Appellant's Brief p. 4.
[12]Record pp. 35-36.
[13]Record p. 16.
[14]Record p. 8.
[15]Record pp. 163-164.

STATEMENT OF THE ARGUMENT

It is difficult to determine if Mr. Rapoport is seriously attacking the findings of *both* the Nevada court and the court below that Mrs. Sirott was domiciled in Nevada at the time of her divorce.

However, it is perfectly clear Mr. Rapoport *is* seriously contending that, even if Mrs. Sirott was domiciled in Nevada, somehow or other the Nevada court could not exercise jurisdiction over her and her divorce because of the existence of the Pennsylvania injunction.

As will be shown, Mr. Rapoport is foreclosed in these proceedings from claiming that the Pennsylvania injunction had any effect on the Nevada proceedings.

Regardless of the effect of the injunction, though, the first issue in this appeal is whether the court below was *clearly erroneous* in finding that Mr. Rapoport did not sustain the burden of proof of overcoming the presumption of domicile and jurisdiction established by the Nevada decree.

I.

MR. RAPOPORT DID NOT SUSTAIN THE BURDEN OF PROOF OF OVERCOMING THE PRESUMPTION OF DOMICILE AND JURISDICTION ESTABLISHED BY THE NEVADA DECREE

The full faith and credit clause of the Constitution requires that *prima facie* validity be accorded the Nevada divorce decree and the burden rests heavily upon the litigant who would escape the operation of the decree by assailing its validity.

Rice v. Rice, 336 U.S. 674, 69 Sup. Ct. 751 (1949);
Williams v. State of North Carolina, 325 U.S. 226, 65 Sup. Ct. 1092 (1945);

Esenwein v. Commonwealth of Pennsylvania, 325 U.S. 279, 65 Sup. Ct. 1118 (1945).

Since the touchstone of jurisdiction in divorce is that the plaintiff must be domiciled in the divorce-granting state, the burden of proof is upon Mr. Rapoport to overcome the presumption of domicile established by the Nevada decree.

Williams v. State of North Carolina, 317 U.S. 287, 63 Sup. Ct. 207 (1942).

Significantly enough, Mr. Rapoport unequivocally acknowledges that "shortly after July 6, 1964," Mrs. Sirott became, and still is, a citizen and resident of the State of Nevada.[16] Such a broad and unsolicited concession is indeed noteworthy since diversity of citizenship for purposes of maintaining the instant action was necessary *only as of May 26, 1966 when this action was instituted.*

What greater evidentiary proof is there of the fulfillment of the domiciliary requirement on July 6, 1964, than the admission by Mr. Rapoport of what took place "shortly after July 6, 1964"? It is difficult, if not impossible, to understand the gymnastics Mr. Rapoport engages in to contend that his former wife was not "shortly before" what she admittedly was "shortly after".

How more vividly could Mrs. Sirott exemplify her domiciliary connection with Nevada at the time of her divorce and shortly prior thereto than by the fact that:

(1) She came to Nevada with the intention of making Nevada her home for an indefinite period;[17]

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[16]Record p. 2.

[17]Record p. 40.

(2) Immediately following her divorce on July 6, 1964 she remarried in Nevada;[18] and

(3) Thereafter, with her new husband, she lived uninterruptedly in Nevada down to the present time.[19]

It is also quite impressive that, in the three years which elapsed between the commencement of the Nevada action and the trial in the instant proceeding, the only shred of "evidence" uncovered by Mr. Rapoport to negate the presumption of validity of the Nevada decree consisted of a few letters sent by Mrs. Sirott, shortly *before* commencing divorce proceedings, from Reno, Nevada, to an address in Camden, New Jersey, for remailing to members of her family!

Little wonder it is that, on such flimsy evidence, Mr. Rapoport was reluctant to contest the issue of domicile before the Nevada court or that the court below was disinclined to conclude that Mr. Rapoport had sustained the burden of showing that Mrs. Sirott was not a bona fide domiciliary of Nevada at the time of her divorce proceeding.

The case of *March Estate,* 426 Pa. 364, 231 A.2d 168 (1967) is, as the court below said,[20] by "an almost incredible coincidence" on all fours with the case at bar. If Pennsylvania under the facts of *March Estate* upheld the validity of that Nevada decree, there is little doubt what its attitude would be with respect to the instant decree

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[18]Record p. 16.
[19]Record p. 16.
[20]Record p. 161.

and no doubt whatsoever as to why Judge Thompson reached the conclusion he did.

Rule 52(a) of the Federal Rules of Civil Procedure requires that on appeal, "Findings of fact shall not be set aside unless clearly erroneous . . . ."

> "The burden placed on an appellant, who seeks to reverse a judgment for error in fact, to show that essential findings are clearly erroneous, is, indeed, a heavy one . . . ."
>
> *Hedger v. Reynolds,* 216 F.2d 202, 203 (2nd Cir. 1954).

It is submitted that, in view of the failure of Mr. Rapoport to sustain the burden of proof required of him, Judge Thompson's finding that Mrs. Sirott was domiciled in Nevada at the critical time was not so "clearly erroneous" as to warrant reversal.

II.

MRS. SIROTT BEING A NEVADA DOMICILIARY, THE NEVADA COURT HAD JURISDICTION OVER THE DIVORCE PROCEEDINGS AND, THEREFORE, IT IS THE NEVADA DIVORCE DECREE OF JULY 6, 1964 WHICH IS ENTITLED TO FULL FAITH AND CREDIT

The celebrated case of *Williams v. State of North Carolina,* 317 U.S. 287, 63 Sup. Ct. 207 (1942) held that a divorce decree is entitled to compulsory recognition in other states if the plaintiff was domiciled in the divorce-granting state, *even though* the decree was obtained without personal service of process in the state and without appearance in the action by the defendant.

The second *Williams* case, *Williams v. State of North Carolina,* 325 U.S. 226, 65 Sup. Ct. 1092 (1945), reiterated the rule of law established in the first *Williams* case in the following language:

> "All the world is not a party to a divorce proceeding. What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States . . . ." 325 U.S. at 232, 65 Sup. Ct. at 1096.

Despite the foregoing explicit determination by the Supreme Court of the United States, Mr. Rapoport nevertheless appears to contend that, even if Mrs. Sirott was domiciled in Nevada, the Nevada court was somehow or other precluded from exercising jurisdiction over her divorce because of the Pennsylvania injunction. He seems to be saying that, *even though he completely refrained from entering the Nevada judicial forum,* the full faith and credit—res judicata doctrine dictates that the Nevada court was incapable of entering a valid divorce decree, and, therefore, *on its own initiative* should have refused to exercise its jurisdiction over Mrs. Sirott's divorce.

The fundamental flaw in Mr. Rapoport's argument is that the law is against him.

Since at least 1939 the Supreme Court of the United States has repeatedly held that failure by a state with jurisdiction (in this case Nevada) to give full faith and credit to the decree of another state (in this case Pennsylvania) is at the very most an error—nothing more. It may even be "basic error" as Mr. Rapoport uses the term, *but it is not a jurisdictional defect.*

Moreover, if the action of the second state is erroneous for any reason whatsoever, including the failure to give proper deference to a prior decree in a sister state, the *only* remedy is an appeal to the highest court of the second state and, thereafter, from the appellate decision of the second state to the federal court.

Failure to initially interpose in the state court the defense of full faith and credit—res judicata, or any other defense, or to appeal from an allegedly erroneous judicial interpretation by the lower state court, constitutes an unqualified waiver.

Consequently, so long as Nevada had jurisdiction in July 1964, it is the Nevada decree of divorce which is entitled to full faith and credit,[21] and the "defenses" asserted now by Mr. Rapoport for the first time are of naught.

Morris v. Jones, 329 U.S. 545, 67 Sup. Ct. 451 (1947),

Williams v. State of North Carolina, 325 U.S. 226, 65 Sup. Ct. 1092 (1945),

Williams v. State of North Carolina, 317 U.S. 287, 63 Sup. Ct. 207 (1942),

Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 Sup. Ct. 44 (1939),

Southard v. Southard, 305 F.2d 730 (2d Cir. 1962),

See also *Roche v. McDonald,* 275 U.S. 449, 48 Sup. Ct. 142 (1928).

In *Treinies* there was a Washington court determination that certain property belonged to A, Washington

[21]The entitlement of full faith and credit of the Nevada decree applies not only to state courts but also to federal courts. 50 CJS, Judgments, § 900, p. 519, and cases cited therein.

determining that it had exclusive jurisdiction. Subsequently, an Idaho court held that the property belonged to B. The Washington judgment was rejected, the Idaho court deciding among other things that Washington did not have exclusive jurisdiction. After the case came up again in Washington the Supreme Court of the United States held that Washington was bound to award the property to B on the basis of the full faith and credit —res judicata effect of the Idaho decision. Since the Idaho court did have jurisdiction, its determination of the ownership of the property was conclusive regardless of whether its rejection of the earlier Washington judgment, albeit based upon exclusive jurisdiction, had been proper or had involved a denial of full faith and credit to that judgment.

In *Morris* a stay order had been issued by an Illinois court. The petitioner had notice of the stay order but nevertheless continued to prosecute his suit in Missouri and thereafter obtained a judgment in Missouri. Petitioner then filed an exemplified copy of the judgment in Missouri as proof of claim in the Illinois proceeding. An order disallowing the claim was sustained by the Illinois Supreme Court against the contention that its allowance of the claim was required by the full faith and credit clause. On appeal to the Supreme Court of the United States the decision of the Illinois Supreme Court was reversed. Said the Supreme Court of the United States:

> "As to respondent's contention that the Illinois decree, of which petitioner had notice, should have been given full faith and credit by the Missouri court, only a word need be said. Roche v. McDonald, . . . makes

> plain that the place to raise that defense was in the Missouri proceedings. And see Treinies v. Sunshine Mining Co. . . . . And whatever might have been the ruling on the question, the rights of the parties could have been preserved by a resort to this Court which is the final arbiter of questions arising under the Full Faith and Credit Clause. Williams v. State of North Carolina . . . . In any event the Missouri judgment is res judicata as to the nature and amount of petitioner's claim as against all defenses which could have been raised." 329 U.S. at 552; 67 Sup. Ct. at 456.

In *Southard* the appellant had obtained a Nevada divorce. Thereafter the appellee commenced her own action for divorce in Connecticut. The appellant entered an appearance in the Connecticut action setting up the Nevada decree by way of defense. The Connecticut court found against the appellant and entered a divorce decree in favor of appellee. Appellant did not file an appeal in Connecticut but instituted an action in the United States District Court for the Southern District of New York in which he asked that the divorce decree be held invalid because the state court had not accorded full faith and credit to the Nevada decree. The District Court dismissed the action. In affirming the decision of the District Court the Court of Appeals for the Second Circuit said:

> "The substantive defense that the Connecticut divorce was barred by the requirement that that state give full faith and credit to the Nevada decree was one that could have been and indeed apparently was raised in the Connecticut court. Whether that court actually passed upon the defense or not, principles of *res judicata* forbid us to consider it. The appel-

> lant's opportunity to attack the Connecticut decree on the merits died with his failure to appeal . . . ." 305 F.2d at 732.

The law as proclaimed by the Supreme Court of the United States has been enunciated in the Restatement of Judgments.

Section 42 provides:

> "Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling in a third action between the parties."

Comment a. to the foregoing Section 42 explains the Rule in the following language:

> "a. As is stated elsewhere . . . , if a prior judgment is not relied upon in a second action in which it would be conclusive, the judgment in the second action is valid although it is inconsistent with the judgment in the first action. If a third action is later brought between the same parties, it is the second and not the first judgment which is conclusive. Similarly, the second judgment is conclusive in the third action even though the first judgment was relied upon in the second action and the court erroneously held that it was not conclusive."

The record clearly indicates that Mr. Rapoport's refusal to enter the judicial arena of Nevada to raise the "defenses" he now asserts, including that of full faith and credit—res judicata, stemmed from his unilateral decision that Nevada did not have jurisdiction.[22]

This conclusion was legally fatal to him.

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[22]Record pp. 7, 57, 58, 131-133.

By willfully (a) refusing to enter a general or special appearance in the Nevada action, (b) failing to raise in the Nevada action any of the "defenses" which he now asserts, and (c) doing nothing else in Pennsylvania or Nevada except to employ the bizarre but scarcely legally effective method of attempting to present alleged defenses to the Nevada court through extra-curricular waving of an alleged Pennsylvania decree in the faces of the Washoe County Nevada Clerk of Court, the Attorney General of Nevada, and all the Judges of Washoe County, Mr. Rapoport has effectively waived his rights.[23]

As Judge Craven in the Nevada divorce proceeding, and thereafter Judge Thompson in the pending proceeding, said:

> "[T]here are ways and means legally to proceed with such matters, and if they are so vitally concerned to bring this matter to the attention of this Court, they should have either made a general or special appearance in this action to do so. By a special appearance they could have adequately done this without submitting the defendant to the jurisdiction of this court."[24]

> "Hindsight persuades us that if Irvin Rapoport had accelerated the Pennsylvania divorce action to trial and final decision with vigor equal to that used in bombarding Rose Rapoport, her attorneys, the At-

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[23]The Nevada Rules of Civil Procedure, similar to the rules of so many other jurisdictions as well as the Federal Rules of Civil Procedure, recognize the concept of full faith and credit—res judicata as being merely an affirmative defense which, if not raised, is waived.

Rules 8(c) and 12(h) of the Nevada Rules of Civil Procedure;

Rules 1030, 1032 of the Pennsylvania Rules of Civil Procedure;

Rules 8(c), 12(b) of the Federal Rules of Civil Procedure.

[24]Record p. 44.

> torney General of Nevada and four Nevada District Judges with injunctive orders, he might have accomplished his objective of retaining an estranged wife within the matrimonial web."[25]

Accordingly, even if the Pennsylvania court had decreed —which it did not—that it possessed prior exclusive jurisdiction over the parties and subject matter; and

Even if the Pennsylvania court had decreed—which it did not—that Mrs. Sirott was a Pennsylvania domiciliary; and

Even if the Pennsylvania court had entered an injunction decree—which it did not—which was final and entitled to full faith and credit; and

Even if the Nevada court was barred—which it was not—by res judicata from making findings concerning its own jurisdiction over the marital status of the parties; and

Even if Mr. Rapoport had properly and legally advised the Nevada court—which he did not—of the "defenses" available to him and the Nevada court had erroneously—which it did not—ruled against him;

NEVERTHELESS, so long as Mrs. Sirott was a Nevada domiciliary at the time of her divorce action it is the Nevada divorce decree which is entitled to full faith and credit and, therefore, the order of the Court below should be affirmed.

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[25]Record p. 161.

III.

EN PASSANT

(a) In any event, the Pennsylvania injunction decree, even if pleaded properly in the Nevada divorce proceeding, would not have been entitled to full faith and credit.

The law is crystal clear, both in Pennsylvania and elsewhere, that injunction proceedings operate only against parties and not against courts.

For instance, when speaking about an injunction of the same nature as that in the instant proceeding the Supreme Court of Pennsylvania itself said in the case so heavily relied upon by Mr. Rapoport:

> "When an injunction is granted for this purpose, it is in no just sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to them and does not even assume to interfere with them. The process is directed only to the parties. It neither assumes any superiority over the court in which the proceedings are had, *nor denies its jurisdiction.*" (Emphasis supplied)
>
> *Wenz v. Wenz,* 400 Pa. 397, 399, 162 A.2d 376, 377 (1960)

In a more recent instance Pennsylvania has also said:

> ". . . our case law indicates the desirability of restraining a potential litigant from proceeding upon a cause of action rather than restraining the tribunal from hearing the matter. See Rothman v. Rothman, 425 Pa. 406, 228 A.2d 899 (1967); Wenz v. Wenz, 400 Pa. 397, 162 A.2d 376 (1960)."
>
> *Peters Sportswear Co., Inc. v. American Arbitration Assn.,* 427 Pa. 152, 155; 233 A.2d 558, 560 (1967)

To mention just a few examples of the universality of the rule, the following quotations from other jurisdictions should suffice:

> "[W]here other States have enjoined litigants from proceeding with a previously instituted Illinois action, this jurisdiction has followed the overwhelming judicial opinion that neither the full-faith-and-credit clause nor rules of comity require compulsory recognition of such injunctions so as to abate or preclude the disposition of the pending case."
>
> *James v. Grand Trunk Western Railroad Company,* 14 Ill. 2d 356, 363, 152 NE 2d 858, 862 (1958)

> "It is apparent that an injunction against the prosecution of an action in another state acts upon the parties rather than the court, and, therefore, the court in which the enjoined action is pending has the power to proceed with the litigation despite the injunction."
>
> *Klienschmidt v. Kleinschmidt,* 343 Ill. App. 539, 546, 99 NE 2d 623, 626 (1951)

> "There is something quite objectionable about assuming jurisdiction of a case the prosecution of which has been lawfully enjoined by a thoroughly respectable court of another jurisdiction. It creates the feeling that this court is an aider and abettor in the violation of the injunction and is in a sense in contempt of the court whose injunction it helps plaintiff to violate. However, the decisions of the Minnesota Supreme Court are respectable authority for the proposition that comity does not require that such injunctions be respected in the State of Minnesota, and I find no federal cases to the contrary."
>
> *Doyle v. Northern Pac. Ry. Co.,* 55 F.2d 708, 710 (D.C. Minn. 1932)

"The injunction is only as to the parties and not the court. This court may proceed despite the injunction and render a valid decree."

* * *

"Even though an injunction may issue against a suit in another state or county for divorce or separation (citing cases) a court is not compelled to observe such a decree."

Cunningham v. Cunningham, 25 Conn. Sup. 221, 200 A.2d 734, 736 (1964)

"While a court usually will not, as a matter of comity permit a party to violate an injunction issued in another state against prosecution of the suit in such court, neither comity nor the full faith and credit clause of the federal constitution requires a court to respect such an injunction, it operating against the parties and not the foreign court."

21 CJS, Courts, §554, page 860, and cases cited therein.

"While there are some decisions which maintain the contrary doctrine, the better opinion is that the court in which the action sought to be enjoined is pending may proceed despite the injunction, in case the enjoined party chooses to brave the consequences of committing a contempt by disobeying the order, and the judgment of the court of law will be valid just as though no injunction had ever been issued."

43 CJS, Injunctions, §50, pp. 503, 504, and cases cited therein.

See also 28 Am. Jur., Injunctions, §227, p. 734, and cases cited therein.

From the foregoing, therefore, there is no doubt that, utterly aside and apart from any other consideration, the Pennsylvania injunction was not entitled to full faith and credit.

(b) The Pennsylvania court never determined that Mrs. Sirott was domiciled in Pennsylvania.

Mr. Rapoport seems to argue that the Nevada court was also barred by res judicata from finding that Mrs. Sirott was domiciled in Nevada because in the Pennsylvania injunction proceeding it was somehow or somewhere determined that Mrs. Sirott was domiciled in Pennsylvania when the injunction was entered.[26]

Aside from what already has been stated at the outset of this brief, the answer to this contention is two-fold:

1. The Pennsylvania court did not so determine;

2. The Pennsylvania court was not required to so determine.

The record in the Pennsylvania injunction proceeding[27] shows that on June 24, 1964, there was no hearing, there was no testimony, there was no evidence taken,[28] there

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[26]Appellant's Brief, page 40.

[27]Record pp. 176-208, 244-245.

[28]Moreover, Mr. Rapoport cites no authority for what appears to be his contention that an allegation as to domicile is a pure averment of fact which requires a denial. Indeed, as every first year law student knows, averments as to domicile are a combination of allegations of fact and conclusions of law and therefore do not require specific pleadings in denial thereof. *Sivalls v. U.S.*, 205 F.2d 444 (5th Cir. 1953); *Taylor v. Milam,* 89 F. Supp. 880 (W.D. Ark. 1950); *Hicks v. Hicks,* 80 F. Supp. 219 (D.D.C. 1941).

were no findings of fact, there were no conclusions of law.[29]

There was simply a decree presented by counsel to the Judge who in turn merely dated and signed it—nothing more![30]

Secondly, the Pennsylvania court undoubtedly did not require a finding or conclusion as to Mrs. Sirott's domicile to be inserted in the decree because such a determination was not a prerequisite to jurisdiction.

Mr. Rapoport himself, in his own brief on page 12, acknowledges in the following language that a conclusion of domicile was not a prerequisite in the Pennsylvania proceedings:

> "*Irrespective of the domicile of the spouse seeking the divorce,* injunctive relief will be granted where the courts of the injunction forum have first acquired jurisdiction of a matrimonial action between the parties" (which) "would be deprived of its effect by the maintenance of a divorce action in a foreign jurisdiction." (Emphasis supplied)

If the cases cited by Mr. Rapoport establish nothing else, they are nevertheless definite authority for the proposition that under Pennsylvania law injunctions in

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[29]If in fact domicile were a jurisdictional prerequisite to the issuance of the Pennsylvania injunction decree, then a finding and conclusion with respect thereto would undoubtedly have been reviewable by the Nevada court under the doctrine of the second *Williams* case.

[30]Even if the Pennsylvania court had determined that Mrs. Sirott was a Pennsylvania domiciliary *as of June 24, 1964* (which it did not), this, of course, did not and could not preclude the Nevada court, or any other court, from reaching a different conclusion *as of July 6, 1964.*

divorce actions may be maintained irrespective of the domicile of the parties.

Rothman v. Rothman, 425 Pa. 406, 228 A.2d 899 (1967);

Wenz v. Wenz, 400 Pa. 397, 162 A.2d 376 (1960).

In *neither* of these two cases did the court determine, or even attempt to determine, the domicile of *either* party, let alone the defendant's.

The rationale of both cases seems to be, as the court below has correctly indicated, that at most the injunction decree was merely issued in aid of protecting and preserving the jurisdiction of the Pennsylvania divorce court over the pending litigation and, as such, the domicile of the parties was irrelevant.

Accordingly, even if there were some legal significance in there being a finding as to Mrs. Sirott's domicile at the time of the Pennsylvania injunction, such a finding is nowhere to be located.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be affirmed.

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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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